United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4135

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE TORRINGTON COMPANY,
Petitioner,

—and—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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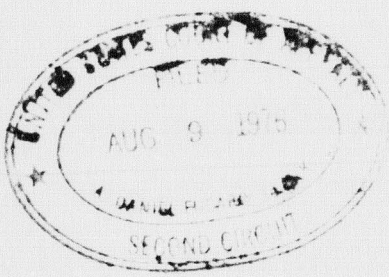
P/S

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD



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August 18, 1976

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
Foley Square
New York, New York 10007

RE: The Torrington Company v. NLRB;
Docket No. 76-4135

Dear Mr. Fusaro:

At footnote four of its brief filed with the Court, the Employer indicated it intended to file a motion seeking to have a certain investigatory file produced by the General Counsel for inspection and copying in connection with the appeal of this case.

This is to inform you that the Employer no longer believes such file is required to perfect its appeal and that it is prepared to go forward on the basis of its brief and the subsequent oral argument to be heard in September.

Please mark your records accordingly. A copy of this letter is being sent to counsel for the Respondent Board in Washington.

Very truly yours,

Jay S. Siegel

JAY S. SIEGEL

JSS:mlw

cc: Elliott B. Moore, Esq.
Deputy Associate General Counsel
National Labor Relations Board

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FOR THE SECOND CIRCUIT

Docket No. 76-4135

THE TORRINGTON COMPANY,
Petitioner,

—and—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

QUESTIONS PRESENTED

1. Is an Employer obligated to provide a Union with information concerning business matters at other plants separate and autonomous from one where the Union is the bargaining agent in the absence of any evidence as to an accretion or merger of the facilities?
2. Should an Employer be found to have violated the Act for failure to supply information when it has responded that data of the kind sought does not exist?
3. Should the Order of the Board be denied enforcement where the Administrative Law Judge's decision, which was adopted summarily and *en toto* by the Labor Board, is not supported by substantial evidence in the record as a whole?

STATEMENT OF THE FACTS

The Torrington Company is a manufacturer of a wide variety of quality precision metal products at a number of plants throughout the Country. Its largest operations are located in Torrington, Connecticut. At its Standard Plant,[1] the main output is needle bearings and other special metal products. The facility employs approximately 1,200 production and maintenance employees in a bargaining unit represented for over twenty-five years by UAW Local 1645 (hereinafter called the "Union"). In this period of time, the parties have successfully negotiated a series of collective bargaining agreements. Since 1964, the agreement has contained Section 15.2 relating to instances where the Company decides to transfer operations from Torrington to other facilities within a seventy-five (75) mile radius.

In 1967, the Employer purchased from private owners the Thomaston Special Tool and Manufacturing Company, Inc. The acquisition included facilities located at three (3) separate locations—Thomaston, Morris and Bantam, Connecticut, all located within a radius of 25-35 miles from Torrington. These facilities manufacture precision components for the clock, timer, and computer industries. No labor organization has been certified or recognized at the three facilities which are a separate subsidiary.[2]

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[1] Only the Standard Plant is involved in this case, hence this brief will only refer to that plant when it mentions the Torrington location. The Law Judge's references to other Company plants in Torrington (i.e., Excelsior, Broad, and the Wire Mill) as being part of the Standard Plant contract unit is totally erroneous as each of these plants has its own unit and collective bargaining agreement. This serious factual error runs throughout the decision and has been the basis for a substantial mistake on one of the basic tenets underlying his conclusion that the Employer violated the Act.

[2] It was stipulated at the hearing before the Law Judge that the Union is not the bargaining representative at any of the other facilities (R. 16). It was also stipulated no petition for an election under Section 9 of the Act had ever been filed at these three plants.

In May, 1968, the Employer acquired by purchase the Vaill Company located in Waterbury, Connecticut, about thirty (30) miles from Torrington. This plant, now known as the Machinery Division, manufactures tube forming machinery, swaging machinery, and other specialized types of machinery. In the latter part of November, 1968, the Employer, after proper notice and negotiations with the Union at Torrington, transferred the Swaging Department at its Standard Plant to the newly-acquired Vaill facility at Waterbury. The twenty-two (22) employees at the Standard Plant affected by the transfer were afforded the opportunity to follow their jobs to Waterbury. Only five (5) bargaining unit employees decided to transfer to Waterbury and were integrated into the Vaill production and maintenance work force of about thirty (30) employees.

The Union then filed a petition (Case No. 1-UC-55) with the NLRB Boston Regional Office to clarify the bargaining unit at the Standard Plant by including the Vaill production and maintenance work force. The Regional Director, after a hearing, dismissed the petition rejecting the Local's contention that the Waterbury operation was an accretion to the Standard Plant and said that the petition raised a question concerning representation which could only be resolved by an election (App. 3).

In 1970, Local 677 of the Teamsters filed a representation petition for a production and maintenance unit at the Machinery Division in Waterbury. An election was held and the employees voted against union representation. Local 1645 although aware of the petition did not participate in the election. Since then, no other representation proceedings have arisen at the Division.

Things remained quiet with the parties renegotiating a new three (3) year labor agreement at the Torrington Standard Plant in May, 1973, without any reference to

the four facilities involved herein. No demands for recognition at such plants were made during the course of the talks by the Union.

About a year later, on April 3, 1974, the Union demanded the Company recognize it as the bargaining agent at the other four plants, but the Company declined because the Union did not represent any of the employees there and thus had no legal or contractual basis on which to seek such recognition. Following this exchange, the Union then filed an unfair labor practice charge, No. 1-CA-9811, alleging the Company was refusing to bargain in violation of Section 8(a)(5), "with reference to its Standard Plant operations located in Waterbury, Thomaston, Bantam, and Morris, Connecticut" (App. 12). The Union claimed the "above plants are covered by the current collective bargaining agreement". The thrust of this charge, as conceded by the General Counsel at the hearing in the present case, was clearly over collective bargaining rights at the other four plants (R. 76).[3] The charge, however, was withdrawn when the Regional Director indicated he would not go to complaint because of insufficient evidence (R. 73).[4] A few days later on June 27, 1974, the Union wrote to the Company requesting the information which is at the apex of this case. (See disputed areas in Appendix to this brief.)

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[3] All references of this nature are to the record of the transcript taken at the trial before the Administrative Law Judge. The Board is being requested to send a copy of that complete record to the Clerk of the Court so it will be on file and available for the case in New York.

[4] At the hearing, it was admitted by the Local Union President that there was insufficient evidence to support the allegations, and the Union was given the opportunity under the Board's standard investigation procedures to withdraw the charge (R. 73). The Law Judge's "analysis" (App. 75-76) and his totally speculative contentions as to what "may" have happened during the course of the Regional Office investigation are completely absurd. In light of the

In their request, they sought information "concerning the Torrington Company's operations at Waterbury, Thomaston, Bantam, and Morris". The major portion of the request sought information relating to the Company's operations at the four unrepresented facilities. It also sought in items 4, 5, 9, and 10 data that would relate to any interfacing of operations and employees between the Standard Plant and the four other facilities (App. 16).

The Company reviewed the request and responded that it believed it had no legal obligation to furnish any information about the other four facilities since the Union was not the bargaining agent for the employees at such plants. On October 3, a charge was filed by the Union over the Company's refusal to respond to the request (Case No. 1-CA-10,137, App. 24). During the investigation, the Company supplemented its earlier response by a second letter on November 25 to the Union that responded to the requests for information in paragraphs 4, 5, 9, and 10, essentially informing them that: (1) no operations or employees had been transferred from the Standard Plant to the other four [4] facilities; (2) no Standard Plant unit employees were working both at the Standard Plant and at any of the other four plants; and (3) no integrated production operations existed (App. 27).

The Regional Director then dismissed the charge on the grounds that the Company was under no legal duty to furnish information under parts 1, 2, 3, 6, 7, 8, 11, 12, 13, and 14 involving the other four (4) facilities since it was not relevant to the bargaining unit at the Standard Plant. As to items 4, 5, 9, and 10, the Regional

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incredible nature of the Law Judge's comments, the Employer sought the consent of the General Counsel to produce his entire file in Case No. 1-CA-9811 for inspection and copying by the parties. This consent was denied. A motion for the production and inspection of this file will be filed with the Court shortly under Section 10(e) of the Act.

Director said that the Company's response had been consistent with its earlier position in Case No. 1-CA-9811 and "no new evidence to rebut it" had been offered. He therefore dismissed the entire charge (App. 29).

The Union appealed the dismissal to Washington. The Office of Appeals upheld the Company's refusal as to items 2, 11, 12, 13, and 14 of the Union's request. As to the remainder, the Appeals decision said the Company's refusal "presented issues warranting Board determination on the basis of record testimony".

A complaint issued by the Board's Regional Director for Region One on April 20, 1975, alleging that the Employer had violated Section 8(a)(1) and (5) of the Act by refusing to provide certain information requested by the Union (App. 33). The Employer filed an answer denying it had violated the Act (App. 40). The Employer appeared at hearings held in Hartford, Connecticut, on June 24 and 25 and contended that it was under no legal obligation to provide portions of the information requested, or where so obligated, it had in fact fully responded to the best of its ability and knowledge. On October 17, 1975, Administrative Law Judge Jerry B. Stone issued a decision finding the Employer violated the Act because it illegally refused to furnish the information requested (App. 42).

In his decision, the Law Judge found as to items 1, 3, 6, 7, and 8, in view of *his* conclusion as to the "possibility" that the four other plants may have been part of a merged or accreted unit with the Standard Plant unit, the information requested by the Union was necessary and revelant and thus the Employer was obligated to supply it to the Union. As to items 4, 5, 9, and 10, the Law Judge found that the Employer had failed to adequately respond to the Union's request. He concluded, in light of the above findings, that the Employer violated Sections 8(a)(1) and (5) and ordered that they respond accordingly to the Union's requests.

The Employer timely filed exceptions with the Board to the Law Judge's findings of facts and conclusions of law as being contrary to the evidence, based on speculation and conjecture and a departure from established case precedent. Further, in light of certain portions of the Law Judge's decision relating to action in an earlier case at the Regional Office, the Employer on December 2, 1975, made a formal written request pursuant to the provisions of Section 102.118 of the Board's Rules and Regulations, of General Counsel John S. Irving that he consent to have the file made available to the parties (App. 86).

On May 3, 1976, a three-member panel of the Board issued its "short form" of decision and order affirming *en toto*, and without explanation, the rulings, findings, and conclusions of the Administrative Law Judge and adopting his recommended order (App. 95). On May 26, 1976, the Employer filed its petition for review of the Board's action with this Court (App. 97). The Board cross-petitioned for enforcement on June 28, 1976. (App. 100).

SUMMARY OF ARGUMENT

The facts in this case quite obviously divide it into two main parts. The first segment (referred to hereafter at times as "Part A") deals with the information sought under items 1, 3, 6, 7, and 8, all of which relate to the Company's four other facilities where the Union is not the bargaining representative and which operate separately and apart from the Standard Plant.

The Company's basic position on this aspect of the case is that since the Union has no existing bargaining rights at the other four plants, there is no legal obligation to answer questions or provide any information about the business of such plants. The data sought is of a particular kind and is not related to any of the customary areas involved in the ordinary course of the

Union's functioning as bargaining representative. This is also reinforced by the Union's waiver, under Section 14.1 of the contract, of bargaining rights over what products shall be made and where they shall be produced, matters in the *exclusive* control of the Company.

Further, since the Union has stipulated they do not represent any employees at such other facilities and in the absence of evidence of former Standard Plant employees having been transferred to such other facilities, or merger of operations therewith, the Union has no possible need for information as no accretion to the units or consolidation with the other plants has occurred.

The second area of the dispute involves items 4, 5, 9, and 10 of the Union's request to which the Employer has responded. Since they seek data relating solely to matters alleged to have taken place at the Standard Plant the Employer recognizes that such areas may be relevant and necessary to the Union's policing of the contractual provision in Section 15.2. The Employer did in fact respond to the best of its knowledge, but that response has been attacked as being inadequate. The Employer denies this is so because the answer to the Union's questions are that nothing they inquire about has taken place; thus, there is no information to supply.

Further, unless and until it is established that a decision has been made by the Employer to transfer operations from the Standard Plant to one of the other four plants and Standard Plant bargaining unit employees are *in fact* going to be transferred, the Union has nothing to police under Section 15.2 of the contract and no need for the kind of data sought under items 4, 5, 9, and 10. In such instance where a decision of this kind has been made, the Company, in the past, has given advance written notice to the Union, met to discuss the seniority and transfer rights of the Standard Plant bargaining unit employees involved, and provided all relevant and nec-

essary information to the Union to represent those employees affected by the transfer.

In the present case, no evidence of any decision to transfer operations or employees under Section 15.2 to any of the four plants in the case has been set forth in the record for no such decision was ever made. Hence, there is no information that can be furnished over and above what the Union has already obtained. Thus, the Company has adequately responded to items 4, 5, 9, and 10 of the Union's request and contends it has complied with all its legal obligations in the circumstances existing here.

ARGUMENT

A. The Request For Data At Four Non-Union Plants Outside The Scope Of The Union's Bargaining Unit.

1. *Information Of This Kind Is Not Presumed Relevant And A "Special Showing" Is Required In This Circuit.*

The present case is not the garden variety, run of the mill refusal to furnish information by an employer. As regards Part A, it involves matters beyond the confines of the established working relationship for the bargaining unit at the Standard Plant and the data sought thus cannot be considered as "presumptively relevant" or invoke any of the *per se* principles frequently applied by the Board and the Courts. Rather, the Court here must reach out for a different set of rules in determining if the Union is entitled to demand such data and the Employer is legally obligated to furnish it.

In the ordinary case, the general rule has been well settled that an employer has a basic obligation under Section 8(a)(5) to provide the employees' statutory bargaining representative with information that is "relevant and necessary" to the performance of their responsibilities in such capacity. *NLRB* v. *Truitt Mfg. Co.*, 351 US 149, 38 LRRM 2042 (1956). The Supreme Court

in Truitt, however, was careful to limit the breadth of their holding:

> "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligations to bargain in good faith has been met." *Supra* at 351 US 153, 38 LRRM 2044.

It is not open to serious question that, as a general proposition, the obligation to furnish "relevant and necessary" information also extends to the Union's administration of a collective bargaining agreement. *NLRB* v. *Acme Industrial Co.*, 385 US 432, 64 LRRM 2069 (1967). However, the Court mentioned a possible limitation on the employer's obligation if the agreement contained a clause by which the union waives its statutory right to such information. *Supra* at 385 US 435, 64 LRRM 2070.

In line with the High Court's qualification in *Truitt*, this Circuit has acknowledged that the basic principles are not automatically applicable in the case of every request by a bargaining representative for information. Thus, where the data sought was not "central to the core of the employer-employee relationship and concerned matters beyond the parameters of the bargaining unit, this Court held there was no obligation on the company's part to make it available. *Machinists* v. *United Aircraft Corp.*, —— F.2d ——, 90 LRRM 2272, 2304 (1975).

It is thus clear that the "other" set of rules places an entirely different cast on the matter. The burden falls, as this Court has said, upon the union to come forward with some extra justification for its request of the particular information. As Chief Judge Kaufman observed in *Prudential Insurance Co.* v. *NLRB*, 412 F.2d 77, 84; 71 LRRM 2254, 2260 (1969); *cert. den.*, 396 US 928 (1969):

> "When a union requests information which is not ordinarily relevant to its performance as bargaining

representative, but which is alleged to have become so because of peculiar circumstances, the courts have quite properly required a *special showing* of pertinence before obliging the employer to disclose." [5] (Emphasis supplied.)

Accordingly, the Employer submits under the foregoing authorities it is now incumbent upon the Court to examine the nature of the Union's request and to decide if the record below establishes that a special showing as to both standards of necessity and relevancy has, in fact, been made such as to impose a legal obligation upon the Employer.[6]

2. *The Record Fails To Establish The Required "Special Showing" Has Been Made Here As To The Data Sought Involving The Other Plants.*

An analysis of the information requested under items 1, 3, and 8 of the Union's letter of June 27 all relate to some business feature of the Company's operations at the four unrepresented facilities. The Employer submits the Union has failed to produce any evidence to sustain the burden of showing a special need for such data as it relates to their functioning as the Standard Plant bargaining unit representative. None of this information can serve any useful current collective bargaining purpose. *C-B Buick, Inc.* v. *NLRB*, (CA. 3) 506 F.2d 1086, 1093; 87 LRRM 2878, 2883 (1974).

Why, for example, should the Union need to know *when* the Employer acquired the four other facilities? Of what value, in the exercise of their responsibility as

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[5] The Court then cites further, as one of the illustrations that require such showing, the *Acme* case ("information concerning the employer's movement of certain machinery out of its plant").

[6] The Board opted not to write a decision in this case and thus the Court is required to frame its inquiry against the canvas painted by the Law Judge. The Court's ultimate responsibility is, of course, encompassed by the standards in *Universal Camera* v. *NLRB*, 340 US 474 (1951).

bargaining agent at the Standard Plant, is it for the Union to know the *reason* each of the plants was acquired several years ago? Finally, what difference does it make *what* products are manufactured at the other plants of the Employer? This data is relevant to Management's decision about the direction of the Company and the use of its own resources, matters totally within the control of the Employer under the collective bargaining agreement.

The short answer to this entire segment of the case is that the Company has both statutory as well as contractual grounds for declining to provide such information. In the first instance, the Supreme Court has acknowledged that under the Act, the employer retains the responsibility for the fundamental control over a business. In *Fibreboard Paper Products Co.* v. *NLRB*, 379 US 203, 57 LRRM 2609 (1964), Justice Stewart's concurring opinion noted that basic managerial decisions involving the commitment of investment capital, as well as the direction and scope of an enterprise, are outside the ambit of the statutory definition of "conditions of employment". *Supra* at 379 US 218. As to the second basis, Section 14.1 of the labor agreement gives the Employer exclusive control of the direction of its manufacturing operations, the products to be made and where they are to be produced (App. 46). This broad sweep of the clause amounts to a clear and unmistakable waiver of the Union's right to bargain over such matters and to obtain information.[7] *Square D. Co.* v. *NLRB*, (CA. 9) 332 F.2d 360, 56 LRRM 2147 (1964).

The data sought under items 6 and 7 of the Union's request would only have relevance if the Union was al-

[7] It should be carefully noted the first portion of 14.1 as it relates to the questions of *what* is to be manufactured and *where* it shall be done are not limited by the second sentence of the Section which relates only to matters involving "methods and processes" of manufacture. For the full text of Section 14.1 see page 46 of the Appendix.

ready the bargaining representative for all the employees at any or all of the four plants. Otherwise, the number of employees and the volume of production at such facilities bears no connection with any valid Union purpose at the Standard Plant.[5]

The Union had attempted to assert a bargaining rights claim at the four plants early in 1974 when it filed unfair labor practice charges claiming a refusal to bargain by the Company. In face of the withdrawal of that charge, it is undisputed that the Union has no legal standing at these four plants upon which it can base a request for information there.

The Law Judge found that the information was needed so the Union could police and administer Section 15.2 of the Standard Plant collective bargaining agreement clause which, it is urged, gives it bargaining rights at the other plants (R. 19). This, however, misconceives the nature of the data. What is transpiring at such facilities is not relevant for it is the events at the Standard Plant that will constitute the wellspring of any claims asserted under Section 15.2. Thus, a cursory reading of the contract clause confirms that there must *first* be some action of the Company transferring operations from the Standard Plant and *then* a decision by employees to follow their jobs to the other plant in order for the Union to have a *need* for information about other facilities of the Employer within a 75 mile radius. Until that series of events happens, under 15.2, there is no footing on which the Union can begin to justify talking about recognition at another plant.

In addition, grounding his conclusion that the data sought is necessary and relevant for the Union to administer the provisions of Section 15.2 of the contract

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[5] This is clearly different from the situation not present here, where the bargaining representative at a particular plant seeks the data as to employees outside the unit but at the *same* facility.

on a "merged or accreted unit theory", because the clause gives the Union recognition rights at a plant of the Company within a radius of seventy-five (75) miles, also shows how the Law Judge has totally misread the contract. The clause clearly speaks in terms of seniority rights for employees who elect to follow their jobs if transferred to another defined plant. It speaks of recognition rights running to the Union "for *such* employees" only.[9] Nowhere does it say recognition rights will be conferred for the entire plant to which the operations and employees have been transferred, which is the cornerstone of the Law Judge's decision under his merger and accretion hypothesis.

What the Union seeks here is information as though they enjoyed bargaining rights for a whole facility. At best under their contract at the Standard Plant, all they can obtain under the collective bargaining agreement, after the occurrence of certain conditions precedent (not present here), is the right to represent "such employees" as elect to follow their jobs if the Company transfers any operations within the parameters of Section 15.2. The crux of the matter is that for the Union to have a color of right under Section 15.2, it must first establish that: (1) the Company has in fact transferred operations from the Standard Plant, and (2) employees have indicated they intend to actually follow their jobs to the other facility.

The Employer submits that no duty arises to respond to items 1, 3, 6, 7 and 8 even in the face of Section 15.2, *unless and until* the Union has shown there are former employees of the Standard Plant actually going to be working on a regular and permanent basis at one of the other four plants. The situation is very similar to that encountered by the Third Circuit in *I.T.&T. Corp.* v.

[9] There is the further qualification that recognition, even on the limited basis, not be otherwise illegal.

NLRB, 382 F.2d 366, 65 LRRM 3002; *cert. den.*, 389 US 1039 (1967), where the Court found no obligation by the company to provide the union with blanket seniority data concerning non-unit employees who at some undetermined future time *might* be transferred into the unit. Here there has been absolutely no showing of Standard Plant operations or employees being transferred to any of the other four plants and it is the Employer's position it has no obligation to respond to requests from the Union about these other facilities. It does acknowledge that if a decision is made leading to such transfers, then, as pointed out by the Court in *I.T.&T.*, the Union would be entitled to seek data as to the transfers. The record here clearly demonstrates that in the only two instances in the past when such a state of events has existed, the Company freely met its obligations both under the statute and the contract.

The ultimate proof of lack of any necessity or relevance is to be found in the position of the General Counsel when he objected at the hearing to the introduction of the Teamsters' 1970 petition at the Waterbury Plant and the Regional Director's certificate of the results thereof (R. 256-7):

> "MR. FLYNN: Your Honor, objection as to their receipt. These employees are not even employees of the Standard Plant. They're employees of Waterbury. They have no relationship at that time, or even at this time, and especially with regard to the question we're trying to litigate in this hearing. There's no evidence at all."

The Company has responded that no employees have been transferred. The Union, which gets regular monthly seniority lists by job, department, and plant under Article IX, Section 9.3 of the contract, has failed to cite a single instance of any employees being permanently transferred from the Standard Plant to the other four

facilities.[10] In these circumstances, *ipso facto* the Union does not have a basis for recognition rights for "such employees", let alone the entire work force at these other facilities on any basis, including a non-existent accretion or merger theory. *Hershey Foods Corp.*, 208 NLRB 452 (1974); *enf'd.* (CA. 3) unpublished, 90 LRRM 2890; *Combustion Engineering, Inc.*, 195 NLRB 909, 79 LRRM 1577 (1972).

Simply stated, it is "putting the cart before the horse" for the Union to demand information about the other four facilities until it has first been established that there is somebody from the Standard Plant now working elsewhere that they can claim to represent under Section 15.2.[11] In the absence of any such persons, the Union does not have a color of right to any data about these facilities.

Further, not a single shred of evidence in the record begins to suggest even the barest outlines of a merged or accreted unit to which the Law Judge adverts. In fact, at the trial, the General Counsel specifically conceded that there is no question here of accretion (R. 18). It thus becomes crystal clear that the Law Judge has conjured up his own brand of justice for the occasion. In his words: "I do not find it necessary to determine in this case whether the Union would be entitled to pursue recognition rights on a theory *other than* that of a merged or accreted unit theory" (App. 69).

But even within the framework that the Law Judge's entire decision on this segment rests upon the sole hypothesis that there may "possibly" have been an accretion or merger of the four other plants with the Stand-

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[10] The clear impact of Section 15.2 deals with permanent transfers, not the isolated and casual visits of Messrs. Hughes and Stolfi cited by the Law Judge in his decision.

[11] This is the true extent of the burden as to "special showing required of the Union in this case and one which they cannot meet on the record here.

ard Plant, the isolated instances of casual contact mentioned by him, at their best, clearly do not begin to remotely support a finding of accretion. In fact, on this record, the extension of the Standard Plant contract to any of the other plants would constitute a violation of the Act. *Sperry Rand* v. *NLRB*, (C.A. 2) 492 F.2d 63, 85 LRRM 2521 (1974); *Hershey Foods Corp., supra.*

The Union at least had a basis for making an accretion argument in 1968 when admittedly the Company actually transferred an *entire* department from the Standard Plant to the Waterbury Plant. Yet, after a full hearing, the Regional Director concluded then that there was no accretion and that the Union had no representation rights at the latter facility. The Law Judge's speculation that the recent circumstances may now warrant a different conclusion, has absolutely no foundation in the record of this case. In fact, he destroys this hypothesis with his preface to such conjecture: Cf. "Although it may not be probable. . . ." (App. 76).

Finally, he undermines whatever semblence of a foundation might be available upon which to erect a case of an accretion when he finds that no attempt was made by the General Counsel to establish the transfer of either operations or employees from the Standard Plant to any of the other four facilities (App. 73).

Thus, there simply is no basis for a conclusion that the information sought by the Union is necessary and relevant under such a theory. In effect, the Law Judge imposes a legal duty on the Company to produce a nightmarish amount of data [12] because of his conjecture as to the "possibility" that it might be relevant to an imaginary claim of accretion or merger. The Employer sub-

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[12] For example, the data sought under item 7 calls for a tremendous amount of material to be compiled and furnished as there are literally hundreds of products manufactured at these four plants.

mits that there is no way the Union will obtain a Board finding of an accretion or merger here (*Hershey Foods Corp., supra*), and that in the absence of a *substantial* showing of circumstances which would clearly lead to an accretion finding by the Board, the information sought cannot meet the dual requirements of being both necessary and relevant. To say that the Employer has a legal obligation to provide the data sought in the absence of any substantial and material issue as to the existence of an accretion or merger, is an erroneous interpretation of the extent of the duty imposed under Section 8(a)(5) of the Act.

The record is barren of any proof of pending grievances, or a need to fashion a future contract. In fact, since the provisions of Section 15.2 were negotiated, no changes in the language have been proposed by the Union. Nor is there any evidence of the Employer's intentions to alter the present status of the four plants as operating on a separate and autonomous basis.

Finally, Section 15.7 of the contract precludes the Union from going to arbitration on the Company's decision to transfer operations under Article XV. Thus, unlike *NLRB* v. *Acme Industrial Co., supra*, the Union cannot need such information to determine if it should go to arbitration for the door to such forum is totally barred to them. It further removes the four plants one more step away from any link of relevance or necessity with the Standard Plant and adds a new obstacle. See *Square D. Co.* v. *NLRB, supra*. The musings of the Law Judge's possibilities have no foundation in fact or in the record here and are mere speculation on his part. It is thin material from which to attempt to weave a fabric of improper conduct. The entire record on this segment of the case falls far short of the required "special showing" that the information sought under items 1, 3, 6, 7, and 8 is relevant to any present legitimate

Union need. Thus, a refusal to furnish it is not an unfair labor practice. *Prudential Insurance Co.* v. *NLRB*, *Machinists* v. *United Aircraft Corp.*, *I.T.&T. Corp.* v. *NLRB*, *supra*.

B. The Company's Response In The Other Areas.

The Company Has Fully Responded To All Lawful Requests For Information Affecting The Standard Plant Unit And Supplied All Existing Data.

The Company has acknowledged, after additional clarification, that items 4, 5, 9, and 10 in the Union's request for information do relate to their function as bargaining representative. In an attempt to meet its legal obligation in these areas, it has provided all of the information it possesses, but that response is challenged as inadequate and a failure to act in good faith within the meaning of Section 8(a)(5) of the Act.

The Company responded to the Union's inquiries to the best of its knowledge and ability. That response is found in William Milligan's letter of November 25, 1974, and indicated that there had been no transfer of either operations or employees, within the meaning of Section 15.2, to the four plants other than the 1968 Swaging Department move which had been fully discussed with the Union (R. 161). Further, it knew of no employees working regularly at more than one plant or of any "integrated" production processes.

At the hearing, it supported such response by putting Mr. Milligan, the Company's Manager of Labor Relations, on the witness stand. His testimony, which is printed *in full* in the Appendix, is brief enough so it can be read and clearly confirms the *bona fide* nature of the Employer's answers to the Union's inquiries. The exhaustive cross-examination of him at the trial by the General Counsel only illustrates a total failure to discredit the Employer's position on this aspect of the case.

The record forcefully shows that since 15.2 was inserted in the contract, there have been only two instances when there was a "transfer of operations" and employees within its scope. In both cases, the Company fully complied with its contractual commitments of notice and discussion as well as its statutory obligation to give the Union all necessary and relevant information.

The practice has been consistent with the bargaining history of the clause. Union President Franculli confirmed at the trial that the reason they sought the clause in the 1963-64 negotiations was to protect the employees against the Company's indications it would move operations out of Torrington if the economic and labor climate did not improve (R. 28). Obviously, the Union was concerned about the problem of the Company relocating to another site within 75 miles as the language of 15.2 speaks in terms of the employees being able to "follow *their* jobs". (Emphasis supplied.)

Nothing in the record of the Union's testimony comes close to such parameters here. All transfers of operations are required to pass through Milligan's department and except for the Swaging and Bonnie moves as he testified, none have occurred (R. 204).[13] Further, no conflicting evidence of any transfer of employees to the other four plants was produced at the hearing.[14] It was conceded at the hearings that the cutting of steel as well as the

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[13] Milligan explained in detail the Employer's understanding of the term "transfer of operations" as it has been used in Section 15.2, in referring to the 1968 Waterbury Swaging move: "There we took that operation and moved it to the Waterbury Plant. We moved the machinery." (App. 120).

[14] Milligan's written response to the Union that none have occurred since then is consistent with his testimony since the only other transfer was *within* the City of Torrington (i.e., to the Bonnie Mills facility; see App. 113. The Union's request of June 27 here was limited to four other facilities not in the Torrington area.

instances of materials being moved between plants did not constitute "transfers of operations" within the meaning of Section 15.2 (R. 114). Indeed, the contrary could not be argued in view of the fact that such instances had been occurring for some time, yet the Union did not file grievances over the failure of the Company to give advance written notice of such "transfers" as it is contractually required to do under Section 15.4. Clearly, if the Union considered the activities described at the hearing to be the type contemplated as falling under Section 15.2 of their contract, it is reasonable to expect it to have filed grievances and gone to arbitration. Even if one gives the Union the benefit of the doubt that it was not immediately aware of such materials movement when they occurred, they quite clearly knew about them for some time and even then did not file grievances.[15]

From the standpoint of administration at the Standard Plant, Section 15.2 quite clearly on its face talks about affording an additional seniority option to those employees whose jobs would be affected by the transfer of operations.[16] The provision has no operative affect, from the Union's standpoint of recognition rights, *unless* employees are going to be transferred, a position consistent with the testimony of Labor Relations Manager Milligan.

In no sense of the word do any of the alleged instances of Union employee "transfers" offered at the

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[15] Things such as the cut steel for Waterbury and New Home have been within the scope of the Union's knowledge for years, yet no grievances were *ever* filed (R. 67). Nor is this a Union that sleeps on its rights having frequently arbitrated during Mr. Franculli's tenure as President (R. 65). There is the further question whether at this juncture the statute of limitations in Section 10(b) of the Act is a bar to their now seeking to contest matters in connection with such activities.

[16] This necessarily involves a question of contract interpretation which has not been raised by the Union since the clause was negotiated over ten (10) years ago.

hearing fall within such boundaries. This is quite apparent from an examination of the contention as it relates to the instances mentioned by the Union. Thus, although David Hughes was a member of the Standard Plant unit at the time of his sporadic trips to Waterbury, the Union conceded his visits did not mean that he had been transferred within the meaning of Section 15.2 to follow his job (R. 99).[17] When viewed in light of the General Counsel's concession (R. 114) that Mr. Milligan's testimony confirmed the correct contractual definition of a transfer (i.e., "When an employee transfers from one plant to another and is placed in a different payroll, performs work exclusively at the other plant, that's a transfer" [App. 118, R. 200]), it is difficult indeed to accord such status to any of the employees involved in the examples offered by the Union.

Yet, the Respondent Board now argues the Employer's response is conclusionary, inadequate and a violation of the Act because it has not given the Union a list of the transfers. But the facts are that there have been *no* transfers of operations and *no* transfers of employees from the Standard Plant unit to any of the other four facilities. Thus, to paraphrase the Court in *Machinists* v. *United Aircraft Corp.*, *supra* at —— F.2d ——, 90 LRRM 2301, ". . . the response of the company was truthful since in fact no lists of transfers were kept as none exist". Nor can the Company be required to furnish information which has never existed. *Korn Industries* v. *NLRB*, (CA. 4) 389 F.2d 117, 123; 67 LRRM 2148, 2153 (1967).

What this case comes down to in the second segment involving the Union's asserted challenge of the Company's

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[17] Nor were any grievances filed over his trips, even though the Union had knowledge of them (R. 100). The name of only one other employee, John Dubiel, was mentioned on direct by the Union President, but he conceded on cross-examination the individual was a salaried employee outside the bargaining unit (R. 99).

response to items 4, 5, 9, and 10, is nothing more than a few unrelated bits and pieces that neither stand independently nor hang together collectively. The third paragraph of the Regional Director's dismissal letter (App. 29) shows that he did not believe the Union had come forward with any new evidence since the withdrawal of the earlier charge. Contrary to the Law Judge, the Regional Director's action is entitled to substantial weight for not only did his Field Agent investigate the charge, but he also was consistent with the finding there was no accretion in 1968 when the Union first raised its claim at the Waterbury Plant.

Interestingly enough, the only "new" information in this entire situation that came out because of the hearing was Mr. Milligan's testimony that in 1974 the Company had transferred the Rear Wheel Bearings Department from the Standard Plant to a vacant loaction across town in Torrington, formerly known as the Bonnie Mills facility and had met with the Union to discuss the matter and furnished complete information in advance of the transfer (App. 155).[18] Further, under the circumstances, the Company went the additional step of granting recognition to the Union for the transferred employees working at the new facility. This instance, however, clearly illustrates the Company's good faith in its dealings with the Union in the area of Section 15.2 of the contract and in meeting its statutory obligations under Section 8(a)(5) of the Act.

It is therefore difficult to understand the Law Judge's decision. The evidence in the record clearly support a contrary conclusion, and was so documented by him in

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[18] The Company's actions in this second instance completely paralleled their handling of the earlier Swaging Department transfer. No grievances or unfair labor practice charges were filed in connection with the Rear Wheel Bearings transfer.

his own comment on the Company's response when he observed:

> "Nor, on the other hand are the facts sufficient to reveal that the November 25, 1975 letter, in and of itself, constituted evidence of a refusal to furnish such information." (App. 74).

Yet, that letter is the only evidence offered as the basis of the Company's alleged violation as to items 4, 5, 9, and 10.[19] Under the *Universal Camera* standards, if the evidence in the record when viewed as a whole, clearly does not furnish substantial support for the decision and order adopted by the Board, that order must be denied enforcement. As the Justices expressed it:

> "[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Supra* at 340 US 488.

The record is replete with evidence contrary to the findings and conclusions of the Law Judge which do not stand up under the scrutiny required to be applied.[20]

CONCLUSION

In stepping back and taking an overview of this case, it becomes apparent that the major purpose behind the

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[19] The text of the letter in the Law Judge's decision is incorrect and reference therefore should be made to it in another place in the Appendix at page 27.

[20] The Law Judge can find no help from the Board which "adopted" his analysis of the case. Further, the Respondent Board's Counsel on this appeal cannot attempt to justify the decision on the basis of post-hoc rationalizations but must take the case as he finds it. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 440; 58 LRRM 2721, 2723 (1965).

Union's request for information of June 27, 1974, is not in furtherance of their responsibility to administer or police the existing labor agreement. Rather, it is in pursuit of a goal that has eluded them ever since the Company acquired the four other plants. Almost from the time of such acquisitions, the Union has tried, through continual resort to the Board, to develop bargaining rights at such facilities as an extension of the historical unit at the Standard Plant. On each of the occasions, they have come up dry. The reason is clear. There simply is no factual basis for their assertion of any legal claim to rights at these other facilities. For this reason, they do not seek entry through the front door under the customary representation election procedures, but continually look for one means or another to enter through the back door in clear derogation of the Section 7 rights of the employees at such plants.

Recognizing this insurmountable hurdle, however, they attach their star to the transfer of operations language in Section 15.2. But it bears repeating again that until they can demonstrate there has been, in fact, an actual transfer of both operations *and* employees within the meaning of that Section, they have no rights to pursue. Thus, under the clause, they must establish *prima facie* that an accretion to the Standard Plant unit has occurred or some other merger or consolidation. Nothing produced in the record of this case remotely begins to support such a conclusion. The Law Judge conceded the General Counsel did not even make an attempt to establish such a condition. In the absence thereof, the Union cannot make any showing, let alone the special showing required in this Circuit, upon which to justify making the Employer respond to requests for information from the Union at any facility where they are not the bargaining representative.

As to the other contention regarding the adequacy of the Employer's response to those items which are relevant, the record speaks for itself. The Milligan letter of November 25 has been completely supported by the testimony. The facts are there and no matter how hard the Union tries, they will not change. What does not exist cannot be furnished.

The sad part of this entire affair is that on those occasions when there has been a situation falling within the scope of 15.2, the Company has fully and voluntarily met every obligation, legal and contractual. Good faith on the part of the Company in its past dealings with the Union is written all over the record. Under these circumstances, the Court should conclude as did the Regional Director who has seen the Charging party on this same old issue over the years, that there is no merit to their contentions, and deny enforcement of the Board's Decision and Order in its entirety. In this case, a fair examination of the record as a whole leads inescapably to the conclusion that it is devoid of evidence against the Employer and in fact supports only a finding that it met its obligations under the Act.

Respectfully submitted,

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August 9, 1976

SPECIAL APPENDIX

PART A

The following are the first series of Union requests for information involved in this case relating to the Waterbury, Thomaston, Morris and Bantam Plants which the Company has declined to answer as not being relevant or necessary for the reasons set forth in the Brief.

1. The date that each of the above operations was acquired.

3. The reason that each operation was acquired.

6. The number of employees working at the Waterbury, Thomaston, Bantam and Morris operations at the time of acquisition and at the present time.

7. The volume of production of each product being manufactured at the Waterbury, Thomaston, Bantam, and Morris operations at the time of acquisition and at the present time.

8. The products being manufactured at the Waterbury, Thomaston, Bantam and Morris operations at the time of acquisition and at the present time.

PART B

The following are the second series of Union requests for information involved in this case which the Company has responded to as listed below in the Milligan letter of November 25, 1974 (App. 27).

4. That date or dates that operations from the Standard Plant, if any, were transferred to each of the above operations with a full description of each such operation including, but not limited to, the volume of work involved.

   Company Response: There have been *no* transfers of operations from the Standard Plant to the Company plants at Waterbury, Thomaston, Bantam and Morris.

5. The same information as requested in paragraph 4 hereinabove with respect to any transfer of bargaining unit employees in connection with transfer of operations including, but not limited to, names of such employees.

   Company Response: There have been *no* such employees transferred from the Standard Plant bargaining unit.

9. The names of any bargaining unit employees who perform work both at the Standard Plant in Torrington and at any of the aforesaid four operations.

   Company Response: There are *no* employees working both at the Standard Plant and at any other plants mentioned.

10. The name, description and volume of each product, if any, which is partially processed at the Standard Plant in Torrington and also is partially processed

at one or more of the four aforesaid operations including, but not limited to, a description of each such partial process.

Company Response: The products at each plant continue to be manufactured, as they have in the past, on a separate basis and without any integrated production operations whatsoever.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE TORRINGTON COMPANY Petitioner -and- NATIONAL LABOR RELATIONS BOARD Respondent	DOCKET NO. 76-4135

CERTIFICATE OF SERVICE

This is to certify that a copy of Petitioner's Brief On Petition To Review And Set Aside An Order Of The National Labor Relations Board in the above-entitled action has been duly served by first-class mail, postage prepaid, upon the following:

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